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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D. C. 20554

In the Matter of:

Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers	)	CC Docket No. 96-238

Dear Mr. Caton:

Enclosed are an original and nine copies plus two additional public copies of the Reply Comments of Cincinnati Bell Telephone Company in the above referenced proceeding. A duplicate original copy of this letter and attached Comments is also provided. Please date stamp this as acknowledgment of its receipt and return it. Questions regarding these Comments may be directed to me at the above address or by telephone on (513) 397-1393.

Sincerely,

David L. Meier

David L. Meier

Enclosure

cc: International Transcription Services, Inc.
Common Carrier Bureau, Enforcement Division (2 copies)
Anita Cheng, Common Carrier Bureau (paper copy and disk)

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	
Telecommunications Act of 1996	)	CC Docket No. 96-238
Amendment of Rules Governing	)	
Procedures to Be Followed When Formal	)	
Complaints Are Filed Against Common	)	
Carrier	)	

REPLY COMMENTS OF CINCINNATI BELL TELEPHONE COMPANY

SUMMARY

Cincinnati Bell Telephone Company ("CBT") urges the Commission to only apply expedited procedures to those specific types of complaints which the Act requires to be resolved in a shorter time. CBT believes the only requirement in the Telecommunications Act of 1996 pertinent to Section 208 complaints is to resolve them within five months. This goal can be accommodated without wholesale upheaval of the procedures in place today. As stated by a number of parties, the most realistic means of achieving this goal is: (1) to try to resolve complaints before they are formally filed with the Commission, so that the clock does not begin: and (2) to shorten the length of time it takes to resolve matters such as motions and discovery procedures. To do this does not require the elimination of motions, discovery or briefing. It only requires that the Commission accelerate the resolution of such matters.

In addition, for the reasons stated herein, Cincinnati Bell Telephone adopts the following positions:

A. CBT supports a requirement that complainants should make efforts to settle their claims prior to filing a complaint.

B. CBT continues to oppose a requirement that defendants fully support their answers with documentation and affidavits.

C. CBT opposes reducing the answer period to ten (10) days.

D. CBT supports discovery remaining available in complaint proceedings.

E. CBT supports status conferences but cautions against holding them too early in the proceeding to be meaningful.

F. CBT supports bifurcating complaints into liability and damage cases, but opposes requiring defendants to post a bond to secure a damage award before it has been granted.

G. CBT opposes requiring the same degree of documentary support required in the original complaint for a compulsory counterclaim, as well as, the commission imposing any restrictions on counterclaims for which it has no jurisdiction.

H. CBT opposes parties being required to disclose their plan to file motions before the motions are even prepared.

I. CBT opposes a requirement that the parties enter into a joint stipulation of facts and legal issues before discovery. CBT also opposes eliminating the briefing process.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Telecommunications Act of 1996 Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carrier	)	CC Docket No. 96-238

REPLY COMMENTS OF CINCINNATI BELL TELEPHONE COMPANY

Cincinnati Bell Telephone Company ("CBT") filed its initial comments in this proceeding on January 6, 1997. A number of other parties also filed comments on that date. CBT files these reply comments to respond to a number of the comments of other parties and to reemphasize the positions stated in CBT's original comments. CBT would also point out that it was one of a very few parties that followed the Commission's request to provide actual language suitable for use in rules that the Commission may adopt. CBT urges the Commission to adopt CBT's comments and implement the various rule changes that were suggested in the Appendix to its initial comments.

CBT would reiterate that the only requirement in the Telecommunications Act of 1996 pertinent to § 208 complaints is to resolve them within five months.[1] This goal can be

[1] MCI suggests that all complaints based upon §§ 251 and 252 should be resolved in 90 days. (MCI comments at p. 5). There is no statutory basis for such a requirement and such a rule would unnecessarily compress the available time in which to resolve what could be very complex disputes. The Commission should only apply such expedited procedures to those specific types of complaints which the Act requires to be resolved in a shorter time.

accommodated without wholesale upheaval of the procedures in place today. As stated by a number of parties, the most realistic means of achieving this goal are: (1) to try to resolve complaints before they are formally filed with the Commission, so that the clock does not begin; and (2) to shorten the length of time it takes to resolve matters such as motions and discovery procedures. To do this does not require the elimination of motions, discovery or briefing. It only requires that the Commission accelerate the resolution of such matters.

A. Pre-filing Procedures and Activities

CBT supports a requirement that complainants should make efforts to settle their claims prior to filing a complaint. CompTel's fear that this requirement would become a procedural barrier is unfounded. (CompTel comments at pp. 3-4). All the complainant must do is act in good faith and try to settle before filing. This would hopefully resolve many complaint situations so that they never need to be filed. In cases that are not resolved, such discussions would still be beneficial in educating the parties about the nature of the dispute before the five month clock begins to run and allow the parties additional time to prepare the case. MFS' suggestion that defendants should have to certify in their answers they tried to settle the case is unnecessary. (MFS comments at p. 2). The purpose of the settlement effort is to resolve the case before filing. The complainant's certification of settlement efforts is a sufficient check that an effort was made. The defendant's certification would come at a time that the complaint had already been filed and would do nothing to prevent the filing or accelerate the handling of the case once it has been filed.

B. Format and Content Requirements

CBT continues to oppose a requirement that defendants fully support their answers with

documentation and affidavits. The limited time allowed for answers does not make such a requirement practical. Particularly, since the proposed rules would allow denials of allegations due to lack of information, it would be impossible for a defendant to provide the contemplated documentation to support such a denial. CBT also continues to oppose the requirement to disclose the identity of individuals having knowledge of the matter and a description of all documents in the answer. The short time to answer may not permit the assembly of this information. The scope of information the rule would require is so broad that it would require exchange of information the other party may not even want and would be of no practical assistance in resolving the complaint. It would make more sense for complainants to serve narrower discovery requests that target the specific information that they truly need in order to resolve the complaint.

C. Answer Time

CBT opposes the suggestion of ACTA that the answer period be reduced to 10 days. Such a short time period would be entirely unreasonable and is not required in order to comply with the five month resolution period. CBT believes that the Commission's proposal to shorten the answer period from the present 30 days to 20 days would only be reasonable if the proposed onerous documentation and disclosure requirements are not required in that same short time frame.

D. Discovery

A number of parties have suggested major reductions in or even elimination of self-executing discovery. See Comments of MFS and KMC at p. 10; AT&T at p.16; Sprint at p. 8; TCG at p. 4; BellSouth at p. 15; Southwestern Bell at p. 13. These suggestions ranged from

limiting the number of interrogatories, to empowering the staff to determine what discovery is appropriate to absolute elimination of discovery.

CBT believes that discovery is a necessary tool that should remain available in complaint proceedings. It is clear, however, that discovery can be abused, through overbreadth, redundancy, an excessive number of requests, etc. The solution is not to throw out the baby with the bath water. What is necessary is to find a solution that will speed resolution of discovery matters without unnecessarily impairing its usefulness. Thus, CBT proposed that the status conference not be held so early in the proceeding that it cannot be used to control and resolve discovery problems. If the conference is held at a time at which that the parties have already had a reasonable opportunity to propound their initial discovery requests and react to the other party's discovery, the conference would be a meaningful opportunity for the staff to rule on the appropriateness of both discovery requests and objections. This would also leave the parties with ample time to actually conduct the discovery prior to the briefing process.

Sprint has supported the concept that discovery abuse could be abated by having the loser pay for the cost of discovery. See Sprint Comments at p. 9, n. 6. CBT disagrees that there is a relationship between who is the "losing" party and who abuses discovery. The "winning" party is just as likely to cause unnecessary discovery costs to have been incurred. Any effort to impose discovery sanctions should be designed to place the costs on the party that unnecessarily caused them, not the party that loses on the merits of the complaint.

E. Status Conferences

CBT supports the concept of status conferences, so long as they are not held too early to be meaningful. Enough time must have passed for the parties to have analyzed the case and

developed their discovery positions. That way, the conference can be productive towards narrowing the issues in the case and the matters upon which discovery is required. CBT disagrees with the suggestion of ICG that the status conference be held earlier. Such a procedure would assure that the status conference could not adequately deal with most discovery problems.

Despite the support for filing a joint order resulting from status conferences (see comments of MFS at p. 15; ACTA at p. 7; Bell Atlantic at p. 6; ICG at p. 17; US West at p. 16; GTE at p. 15; and Southwestern Bell at p. 8), CBT believes that the effort required to agree upon a joint order within 24 hours of the conference will exceed the benefits. It would appear more efficient for the staff simply to issue an order. If the parties are unable to agree on the language, the staff will need to resolve any controversies anyway and the parties and staff will all have wasted energies on that effort that could have been devoted to more productive matters.

MFS (pp. 11-12) has advocated an additional "meet and confer" conference between the parties separate from the status conference, to take place at a later time. While such a meeting might be useful in some cases, CBT does not believe it should be mandatory in every case. In cases where a party believes such a meeting would be productive, it could be discussed at the status conference. However, the formality and onerous requirements that MFS suggests should come out of such a meeting would more likely be counterproductive to the main goal of this proceeding, which is to speed up the complaint process. It is important that this process not result in additional things for parties to do in complaint cases that are not required today, unless it is clear that doing so will materially aid in streamlining and quickening the process.

F. Damages

There was nearly universal support for the Commission's suggestion that complaints

could be bifurcated into liability and damage cases. However, a few parties made suggestions that go too far. AT&T (p. 10), ICG (p. 20), and TRA (p. 23) support a requirement that Defendants escrow money or post bond after a liability award, but before damages are actually calculated or awarded. As CBT stated in its opening comments, it is inappropriate to require defendants to post bond to secure a damage award before it has been granted. There is no legal justification for such a procedure and, in fact, the Commission lacks authority to require it. The only means of enforcing an order to pay money is in an independent action pursuant to 47 U.S.C. § 407.

ICG (p. 21) further suggests that all damage complaints should be resolved within 90 days. There is no statutory requirement to impose a 90 day limit on ordinary § 208 damage complaints and the Commission should not impair its flexibility in handling such cases by creating such a rule.

G. Counterclaims

In its original comments CBT suggested, due to time constraints, that, if the Commission requires compulsory counterclaims to be filed with answers, it not require the same degree of documentary support as would be required with an original complaint. CBT still ascribes to that view, but upon reflection, agrees with US West's comments (p. 14) that the Commission does not have jurisdiction to decide many types of counterclaims. Only in instances where both parties to a complaint proceeding are carriers, and the counterclaim involves an allegation of a violation by the complainant that could itself be the subject of a stand-alone complaint, could the Commission exercise jurisdiction. Thus, the Commission should not attempt to impose any

restrictions on counterclaims for which it has no jurisdiction.

H. Motions

It has been suggested by ICG that parties disclose that they plan to file motions before the motions are even prepared. See ICG Comments at p. 22. CBT would oppose such a requirement. This would create new opportunities for arguments about things such as when a party began preparing a motion, how long it took the moving party to prepare and serve the motion, whether the notice disclosed the precise matter contained in the motion, etc.

I. Other Required Submissions

CBT still opposes the proposed requirement that the parties enter into a joint stipulation of facts and legal issues shortly after the answer is filed. While a number of parties have supported such a joint stipulation (see comments of AT&T at p. 19; MFS at p. 21; US West at p. 12; BellSouth at p. 20; Southwestern Bell at p. 13; and Bechtel & Cole at p. 4), CBT still believes the effort would be counterproductive. At that stage in the proceeding, the matters on which the parties agree and disagree ought to be obvious from the pleadings. Without having the benefit of discovery, it is unlikely that parties would yield from their initial positions at that time. Only after discovery would a joint stipulation be likely to have any result different from the pleadings. Perhaps by that time, the parties would benefit from a stipulation narrowing the issues. However, given the imminence of the briefing process at that stage of the case, the effort to reach a stipulation is likely to expend more energy and resources than it yields as progress towards resolving the complaint.

Some parties have suggested that briefing be eliminated. See Comments of Bell Atlantic at p. 4. CBT disagrees and believes that briefing is an integral part of the due process required in

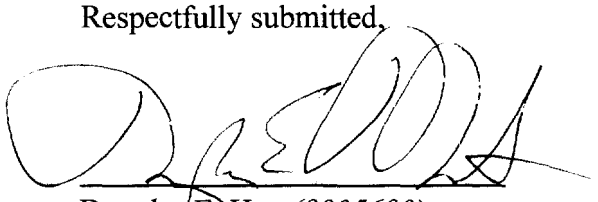
order to fairly determine complaint cases. Without briefs, the Commission would have nothing with which to decide cases other than what was contained in the complaint and answer. If the parties conducted discovery, none of the fruits would be considered by the Commission. In short, the briefs are the parties' opportunity to fully explain their legal positions, describe the evidence that supports their positions, and argue effectively to the Commission why the case should be decided in a particular way. The Commission should not eliminate this necessary step.

Other parties have suggested compressed briefing schedules. For example, CompTel proposes that initial briefs be filed 20 days after discovery closes with reply briefs filed 10 days later. (CompTel comments at p. 11). MFS and KMC suggest that initial briefs be filed 30 days after discovery is completed with replies due 10 days after that. (MFS and KMC comments at p. 23). ICG suggests that initial briefs be filed 85 days after the complaint, followed by the brief in opposition in 15 days, and a reply brief 10 days later. (ICG Comments at p. 25). CBT would suggest that tying the briefing schedule to the end of discovery would be a mistake and would create a risk that the case is not completed on time. It would be more efficient for briefs to be due at some fixed date (at least 90 days and preferably longer) after the complaint is served, to assure that sufficient time is left for reply briefs and a considered decision by the Commission. The discovery rules (or case specific discovery management orders) should be structured so that responses to discovery are received a sufficient time in advance of the briefing date that the discovery results would be useful to the briefing. In addition, a sufficient time, such as 20 days, should be preserved between the time of the opening and reply briefs to allow the parties to meaningfully assess and respond to the arguments made in the opening briefs.

CONCLUSION

For the reasons stated herein and in CBT's original comments, CBT requests that the Commission fully consider CBT's suggestions, adopt them in its rulemaking and issue rules consistent with the same.

Respectfully submitted,



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Filed: January 31, 1997

CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing reply comments of Cincinnati Bell Telephone Company have been sent by first class United States Mail, postage prepaid, or by hand delivery, on January 31, 1997, to the persons listed on the attached service list.

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* via hand delivery

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